Nos. 77-753 & 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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MOTION BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in

support of the petitions for certiorari in these cases.[1] Counsel for the petitioners have consented to the filing of this brief, but counsel for the respondent has declined so to consent, making the filing of this motion necessary.

INTEREST OF THE AFL-CIO

1. The AFL-CIO is a federation of 102 labor organizations representing approximately 13,500,000 employees throughout the United States. Its constituent labor organizations are the exclusive bargaining representatives for employees engaged in every facet of industry, commerce and government.

2. Mindful that motions for leave to file a brief *amicus curiae* in support of petitions for certiorari are not favored under Rule 42(1), the AFL-CIO has filed such motions only rarely—the last occasion was at the 1966 Term of this Court. We have foreborn to do so even when our affiliates have been petitioners in cases of great importance to them, and which, in our view, fully merited this Court's attention. The present case, however, is truly extraordinary in its sudden reversal of prior understandings of the law, and its consequent unsettling of existing relationships.

3. For over forty years, labor organizations affiliated with the AFL-CIO have responsibly exercised their obligations as exclusive collective bargaining representatives. They have secured pension coverage for many millions of employees who have received pension benefits, and for many millions who are presently working with the expectation of receiving benefits when they retire. In thousands

[1] The petitions which seek review of the decision and order in *Daniel* v. *International Brotherhood of Teamsters, et al*, 561 F.2d 1223 (C.A. 7, 1977) were filed on November 25, 1977. The clerk has given respondent leave to file his brief in opposition by January 16, 1978.

of instances bargaining has resulted in the creation and maintenance of pension trusts which are jointly administered by unions and employers pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5). The unions' performance of their responsibilities as fiduciaries on behalf of plan participants in such trusts will be immeasurably complicated, and will expose them to litigation expenses and possible financial liability under the securities laws, if the Court of Appeals' decision herein is permitted to stand.[2]

4. The petitions for certiorari and briefs *amicus curiae* which have been filed describe in sufficient detail the immediate adverse impact of the decision below on almost all those who are involved in the financing and administering of non-contributory private pension plans. It is not our desire to reiterate the concerns expressed in those submissions. We believe, however, that not enough has been said, except by necessary implication, about the effects of the decision below on employees who are covered by pension plans, and for whose principal benefit those plans are established and maintained. The court below evidently believed that its interpretation of the securities laws furthered the interests of these employees. The essence of the brief which we seek leave to file is to show that this is not so; the true interests of these employees is better served by adhering to the materially different disclosure rules established by Congress—whose concern for the individual employees is as great as that of the Court of Appeals, and whose constitutional authority to provide for their welfare is undeniably greater.

[2] Although it affirmed the denial of a motion to dismiss an action against the union defendants in this case as well as against a pension fund trustee (who is sued as representative of the other trustees), the court below did not consider the basis, if any, of union liability, assuming that the securities laws apply.

ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

It seems to us to be sufficient reason for this Court to decide the question presented by these petitions that the Court of Appeals, under the beguiling rubric of "[r]eading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA" (Pet. App. 46),[3] has drastically restructured the design recently and painstakingly adopted by Congress. But as that point has been adequately discussed by others, the appended brief makes a single additional major point: The decision below admittedly creates a competition for the benefits which pension funds are able to pay between those who have qualified to be beneficiaries under their plan's rules and those who, though otherwise ineligible, are now given claims under the securities laws (Pet. App. 49).

CONCLUSION

For the foregoing reasons, this motion by the AFL-CIO for leave to file a brief as *amicus curiae* should be granted.

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[3] Pet. App. refers to the Appendix filed with the Petitions for Certiorari.

Respectfully submitted,
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In the Supreme Court of the United States

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully urges the Court, for the reasons set forth below, to grant the petitions for writs of certiorari in these cases to review the decision of the United States Court of Appeals for the Seventh Circuit.

Interest of the Amicus Curiae

The foregoing motion requesting the Court's leave to file this brief sets forth the basis of the AFL-CIO's interest in this case.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW WOULD UNDERMINE THE LEGITIMATE EXPECTATIONS OF PENSION PLAN PARTICIPANTS.

The opinion of the Court of Appeals evidences that the court was greatly moved by the plight of the plaintiff in this case who was disqualified from pension benefits by the break-in-service rule of his pension plan. (Pet. App. 1-7). But the rule of law which the court declared will not only provide a cause of action to Daniel and other individuals who are adversely affected by the almost unique eligibility requirements of the Local 705 plan, but will effectively undermine all eligibility requirements, no matter how reasonable; the decision thereby provides a windfall to participants who have not satisfied the plan's eligibility rules to the prejudice of those who are entitled to benefits. As we shall show, this result follows directly from the disclosure requirement which the court declared, and is tacitly acknowledged in the court's opinion.

The Court of Appeals held that:

> "Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." (Pet. App. 46-47.)[1]

[1] "Pet. App." refers to the Appendix filed with the Petitions for Certiorari. See also Pet. App. 8: "The effect of the [District Court's] opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F. Supp. at 551), that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts."

It has been stressed, in other submissions in this Court, that this holding exposes all pension funds to liability under the securities laws because apparently no one has ever made such disclosure.[2] But insufficient attention has been given to the nature of the claims to which this rule will lead: *Every pension plan participant who is denied benefits for any reason when he retires or withdraws from a pension plan will be able to state a non-dismissable claim against the fund.* For, even if the individual knew about the particular eligibility requirement which he failed to satisfy, he will not have been told the actuarial probability that he would fail to receive benefits for *some* reason, and under the Court of Appeals' decision this gives him a claim if he failed to receive benefits for *any* reason.

Respondent's own situation illustrates our point: The court below did not merely hold that he stated a claim because he alleged that the union failed to disclose the break-in-service rule which was the basis for his disqualification. A holding so limited would have precluded claims by the vast majority of individuals who receive no benefits because basic plan eligibility rules have almost universally been made known to participants, and, indeed, under ERISA *must* be disclosed. Rather the ruling of the

[2] The Court of Appeals left to "the process of litigating elucidation," *Machinists* v. *Gonzales*, 356 U.S. 617, 619, the question of what other disclosures are required, and what past failures to disclose will now be actionable. In this respect prior decisions under the securities laws provide little, if any, guidance because the information material to a pension plan participant is so unlike that which is of concern to an investor in one of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H.R. Rep. No. 85, 73d Cong., 1st Sess, 11 (1933), quoted in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 847, 848. It is small comfort that the class-action bar stands ready, willing and able to provide the litigation which may produce elucidation; the lesson is sure to be expensive for the pension funds, win or lose.

court below would allow Daniel to recover even if it is established at trial that he knew of the break-in-service requirement, because he had not been told that there was an 8% probability (based on the aggregate of all participants in the plan) that he would ultimately qualify. The same result would obtain for individuals who fail to meet some less unusual requirement: For example, one who left the industry after eight years because he was discharged, or voluntarily, would state a cause of action because, although he knew that he must have twenty-years service credit, he had not been told what the chances are that he would not reach that goal, and thus would not receive a benefit.

The omission of the probability that he will not receive a pension is equally material (or immaterial) to an individual's decision to accept or retain employment, whatever may ultimately be the reason that he retires or otherwise leaves the plan without getting a pension. And since all plans have been "guilty" of the same omission, all are equally vulnerable to suit from plan participants who for any reason did not receive a benefit, including individuals who left the plan at any time in the past (within the limitations period) without applying for, or having any reason to believe that they were entitled to, benefits. While few such individuals would be entitled to a pension—the relief that respondent seeks—the Court of Appeals "investor" construct would apparently enable the plaintiff to seek a rescission of his "investment"—that is, an award of the moneys paid into the fund because of their labor.[3] But even a judgment requring the payment of those moneys to any significant proportion of the plan's former participants (and

[3] The Court of Appeals did not pass on "the entirely separate and not uncomplicated question of the form of relief" created by its liability theory, stating that "the construction of formulae giving the measure of damages is for the trial court in the first instance." (Pet. App. 49.)

to others whose claim subsequently arises because some event occurs which makes clear that they will not receive benefits under the plan), would undermine the plan's financial stability. It will have that effect precisely because it will undermine the universal actuarial assumption that moneys will be received, and available for paying benefits, on the basis of hours worked by employees who will never receive a pension.[4]

The Court of Appeals perforce acknowledged that its ruling would provide a recovery for individuals who are ineligible under the plan's terms, but it discounted the impact on employees who would ultimately be qualified. For the court said:

> "It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants." (Pet. App. 49.)

In other words, the decision below reorders the priorities among plan participants: The interests of those who are performing and will have satisfied all the conditions for obtaining a pension are to be "balance[d]" by district courts with the "needs of plaintiff", and presumably the "needs" of others, who like plaintiff, performed covered employment without being informed of the "actuarial probability" that they would not receive a pension, and in fact received none.

But the Congress has not assigned the tasks of setting pension priorities to the courts according to their own views of what is equitable. The legislature has determined that these priorities should be set by private parties through the collective bargaining process. Those parties are, of course, subject to the restraints of the *labor* laws, includ-

[4] While plans differ in their assumptions, because of the nature of employment in the industry, past experience, etc., all plans anticipate that a substantial number of covered employees will never be entitled to any benefits.

ing the duty of fair representation, §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. 186(c)(5), and most importantly, ERISA, which, *inter alia*, sets limits on the eligibility requirements that can be imposed and does so without providing for retroactive vesting for those who had failed to qualify before the Act passed.

CONCLUSION

For the above-stated reasons the petitions for writs of certiorari should be granted.

Respectfully submitted,

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